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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE  
OHANA; DEBORAH J. WARD; PAUL K. NEVES; and  
KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE,  
a domestic non-profit Corporation

BOARD OF LAND AND NATURAL RESOURCES  
STATE OF HAWAII

IN THE MATTER OF	) Case No. BLNR-CC-16-002
	)
	) MOTION TO STRIKE CONSERVATION
A Contested Case Hearing Re	) DISTRICT USE APPLICATION, HA-3568,
Conservation District Use Permit	) DATED SEPTEMBER 2, 2010, AND/OR
(CDUP) HA-3568 for the Thirty Meter	) MOTION FOR SUMMARY JUDGMENT;
Telescope at the Mauna Kea Science	) MEMORANDUM IN SUPPORT OF
Reserve, Kahohe Mauka, Hamakua	) MOTION; DECLARATION OF
District, Island of Hawaii,	) RICHARD NAIWIEHA WURDEMAN;
TMK (3) 4-4-015:009	) EXHIBITS "A" – "E"; and
	) CERTIFICATE OF SERVICE
	)
	)
	)

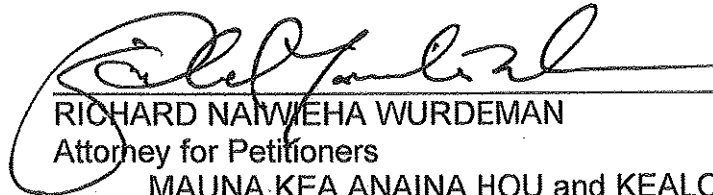
MOTION TO STRIKE CONSERVATION DISTRICT USE APPLICATION, HA-3568,  
DATED SEPTEMBER 2, 2010, AND/OR MOTION FOR SUMMARY JUDGMENT

COMES NOW Petitioners MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA, CLARENCE KUKAUAKAHI CHING, FLORES-CASE OHANA, DEBORAH J. WARD, PAUL K. NEVES, and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation (also referred to herein collectively as "Petitioners"), by and through their counsel undersigned, and hereby moves for an Order striking the Conservation District Use Application, HA-3568, Dated on or about

September 2, 2010, and/or granting the Motion for Summary Judgment and striking and dismissing the Conservation District Use Application, HA-3568, as well as dismissing University of Hawaii at Hilo as a party. The proper parties and required signatures under the rules have not been presented and the CDUA is invalid, null and void, and of no effect.

This Motion is brought pursuant to Hawaii Administrative Rules ("HAR") §§ 13-1-12 and 13-1-34. This Motion is also based on the Memorandum in Support of Motion and the authorities and arguments set forth therein, Declaration of Richard Naiwieha Wurdeman, and exhibits attached hereto; the records and files in the instant case; and any further evidence that may be adduced and arguments that may be presented at a hearing on the said Motion.

DATED: Honolulu, Hawaii, July 15, 2016.



RICHARD NAIWIEHA WURDEMAN  
Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA  
PISCIOTTA; CLARENCE KUKAUAKAHI CHING;  
FLORES-CASE OHANA; DEBORAH J. WARD; PAUL  
K. NEVES; and KAHEA: THE HAWAIIAN  
ENVIRONMENTAL ALLIANCE, a domestic non-profit  
Corporation

BOARD OF LAND AND NATURAL RESOURCES  
STATE OF HAWAII

IN THE MATTER OF	)	Case No. BLNR-CC-16-002
	)	
A Contested Case Hearing Re	)	MEMORANDUM IN SUPPORT
Conservation District Use Permit	)	OF MOTION
(CDUP) HA-3568 for the Thirty Meter	)	
Telescope at the Mauna Kea Science	)	
Reserve, Kaohe Mauka, Hamakua	)	
District, Island of Hawaii,	)	
TMK (3) 4-4-015:009	)	
_____	)	

MEMORANDUM IN SUPPORT OF MOTION

I. BACKGROUND.

According to State of Hawaii Department of Commerce and Consumer ("DCCA") records, the TMT Observatory Corporation, which is a foreign non-profit corporation, was registered with the DCCA on November 9, 2009, with a stated purpose in the DCCA documents as being, "TMT will develop, build and operate a 30 meter class telescope, these facilities will be used to foster (1) scientific interaction among educational and research institutions and (2) college and university educational programs." Please see Exhibit "A" attached hereto which are true and correct copies of records from the DCCA website. In the Conservation District Use Permit Application ("CDUA") for the Thirty Meter Telescope, Island of Hawai'i, dated September 2, 2010, the Legal Name of the Applicant was listed as the "University of Hawai'i c/o of University of Hawaii at Hilo" and the contact person and the contact person's title was listed as Dr. Donald Straney, Chancellor [of the University of Hawaii at Hilo]." Please see Exhibit "B" attached hereto which is a true and correct copy of some of the pertinent pages of the CDUP Application, dated September 2, 2010. A signature is included of what appears to be that of Donald Straney, dated September 2, 2010. Under the Overview of the Proposed Use, Section 1.2 of the CDUA, it provides, in pertinent part (with footnote 4 omitted), as follows:

On behalf of the TMT Observatory Corporation, the University of Hawai'i is seeking a Conservation District Use Permit (CDUP) from the State of Hawai'i

Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory within an area below the summit of Mauna Kea known as "Area E." The Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations. The TMT project is currently a partnership among the TMT Observatory Corporation (TMT), the University of California (UC), the California Institute of Technology (Caltech) and the Association of Canadian Universities for Research in Astronomy (ACURA). The National Astronomical Observatory of Japan (NAOJ) is a collaborator and potential partner, and the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC) and India's Department of Science and Technology (DST) are observers and potential partners in the TMT project.

(Emphasis added). See Exhibit "B."

On December 2 and 3, 2010, BLNR held public hearings on the CDUA in Hilo and Kailua-Kona, respectively. Approximately 200 individuals attended the hearings, 84 of whom testified, and a number of individuals and groups provided written comments before and after the hearings. A range of opinions were expressed in support of and against the CDUA, and at least 6 individuals or groups requested a contested case hearing verbally, in writing, or both. In the weeks that followed, Samuel Lemmo, Administrator of the Office of Conservation and Coastal Lands, and Michael Cain, Staff Planner for the Office of Conservation and Coastal Lands, completed a staff report for the BLNR that summarized the CDUA and public comments, including the requests for a contested case hearing, and recommended that BLNR approve the CDUA and issue a Conservation District Use Permit (CDUP), along with twenty-one conditions for the permit.

On February 25, 2011, at the regularly-scheduled BLNR public board meeting, Samuel Lemmo gave a presentation to the Board and forty-one individuals testified either for or against the application, which included several more requests for a contested case hearing and objections to the BLNR issuing a permit before holding a contested case hearing. Despite the public testimony and the objections to the BLNR's issuance of a permit before the contested case hearing was held, the BLNR voted unanimously to approve the application and issued a permit. The BLNR adopted the recommendations and the conditions in the staff report. Subsequently, at the same Board meeting, BLNR voted unanimously to hold a contested case hearing and written

requests were also subsequently made by the Petitioners. The Petitioners made timely requests for a contested case hearing as required by Hawaii Administrative Rules ("HAR") §§13-1-28, 13-1-29, 13-1-30 and 13-1-31. Commencing in August of 2011, a hearing officer approved by BLNR's Chair presided over a lengthy contested case hearing process, during which voluminous written direct testimony was admitted, and twenty-six witnesses, under oath, testified and were cross-examined.

On April 12, 2013, and following the conclusion of the contested case hearing, the BLNR issued its 126-page findings of fact, conclusions of law and decision and order ("BLNR's decision and order"). A timely agency appeal was taken by the Petitioners to the Circuit Court of the Third Circuit and after briefs were submitted by the parties and oral arguments made before the court, the court issued its decision and order affirming the BLNR's decision and order and entered final judgment on May 5, 2014. The Petitioners then timely filed a notice of appeal.

In that same month, May of 2014, and according to the Motion to Have TMT International Observatory, LLC Admitted as a Party in the Contested Case Hearing, filed on April 8, 2016 ("TIO's Motion to be Admitted as a Party"), in the instant case, TMT International Observatory, LLC ("TIO") was established to construct and operate the TMT Project. Please see page 3 of the Memorandum in Support of Motion, which is attached to TIO's Motion to be Admitted as a Party ("TIO's Memorandum in Support"); please see also Exhibit "C" attached hereto which is a true and correct copy of records from the DCCA website. According to TIO's Memorandum in Support, TMT International Observatory, LLC is a non-profit organization and its members include the Regents of the University of California, the California Institute of Technology, the National Institutes of Natural Sciences Japan, the National Astronomical Observatories of the Chinese Academy of Sciences, the Department of Science and Technology of India, and the National Research Council of Canada. Id. The Association of Universities in Astronomy is characterized as a TIO associate. Id.

On July 28, 2014, and according to TIO's Memorandum in Support, the University of Hawaii and the TMT International Observatory, LLC. entered into a sublease agreement and non-exclusive easement agreement ("Sublease") in which a portion of the Mauna Kea Science Reserve was subleased by the University of Hawaii

to TMT International Observatory, LLC. to construct and operate the TMT Project on Mauna Kea.<sup>1</sup> Please see Page 4 of TIO's Memorandum in Support. A copy of the said sublease was attached to the Declaration of J. Douglas Ing, dated June 17, 2016, that was submitted in the instant case. See Exhibits "A" and "B" attached to the said Declaration of J. Douglas Ing. Also attached to the Declaration of J. Douglas Ing was a copy of a Scientific Cooperation Agreement between TMT International Observatory LLC and the University of Hawaii, dated July 28, 2014, concerning the design, construction and operation of the Thirty Meter Telescope on Mauna Kea, Hawaii. See Exhibit "C" attached to the said Declaration of J. Douglas Ing.

The relationship between TMT Observatory Corporation and TMT International Observatory, LLC ("TIO") was further clarified TIO's position by J. Douglas Ing at the recent hearing on TIO's Motion to be Admitted as a Party, held on June 17, 2016, in the instant case:

HEARING OFFICER AMANO: So I have some questions for Mr. Ing. Mr. Ing, is there a difference between TIO and the Thirty Meter Telescope Observatory?

MR. ING: Yes.

HEARING OFFICER AMANO: So TIO is a new entity?

MR. ING: Yes. It's more recently formed.

HEARING OFFICER AMANO: Are they the same people essentially?

MR. ING: No. So the TMT Observatory Corporation, which is a not-for-profit corporation, was formed years ago. And it initiated the Environmental Impact Statement, as well as became a party – not party, but the application for the CDUP. But it was always known, and it's even disclosed in the EIS that was done in 2008/2009 that a larger entity would be formed and it would likely include governments of Japan, China, India and Canada. That's been disclosed from day one.

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<sup>1</sup> It is important to note that the CDUA, dated September 2, 2010, that was submitted by UH, has never been amended or resubmitted and it is still being brought on behalf of a different entity from the instant movants, TMT Observatory Corporation, that is still an active corporation according to DCCA records, and the CDUA is not being brought on behalf of the recently admitted party in the instant contested case, TMT International Observatory, LLC.

...

HEARING OFFICER AMANO: I guess what I'm asking is, how is your participation different from UH Hilo's?

MR. ING: Well, while UH Hilo is the Applicant, they control the process. They have a seat at table. TIO does not. But we have most at stake in the outcome of this proceeding.

HEARING OFFICER AMANO: But you didn't have a seat at the table at the first hearing.

MR. ING: We did not, but that's largely because the custom and practice of the department at that time was to have the University prepare and file the application, because they hold the master lease to the summit area. And because they have – essentially the landowner through that master lease, they submit the application.

(Transcript of Proceedings of June 17, 2016: Pages 23-25). Please see Exhibit "D" attached hereto, which are true and correct copies of the said pages in the transcripts).

Prior to the execution of the Sublease, the matter went before the Board of Land and Natural Resources for the required consent of the BLNR at a meeting on June 27, 2014, at which point the BLNR granted the consent to the Sublease, but "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded. At the BLNR's meeting on July 25, 2014, the Board denied requests for a contested case hearing, including a request made by E. Kalani Flores. (E. Kalani Flores is part of the Flores-Case 'Ohana in the instant case and a petitioner). E. Kalani Flores filed a timely agency appeal on that matter.

On December 2, 2015, the Hawaii Supreme Court entered its decision in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224 (2015) in which it vacated the Third Circuit Court's May 5, 2014 Decision and Order and Final Judgment thereon and remanded to the circuit court to further remand to the BLNR for proceedings consistent with the Supreme Court's opinion, so that "a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion." On February 22, 2016, the Third Circuit Court, the Honorable Greg K. Nakamura, presiding, entered its order of remand to the BLNR.

On April 5, 2016, and in the agency appeal dealing with the consent of the Sublease by the BLNR, in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civ. No. 14-1-324 (Third Circuit-Hilo), the Third Circuit Court, again, the Honorable Greg K. Nakamura, presiding, issued its Order for Remand. Please see Exhibit "E" attached hereto which is a true and correct copy of the said Order.<sup>2</sup> The court concluded, *inter alia*, that the fact that the TMT CDUP had been vacated as a result of the Hawaii Supreme Court's decision in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, *supra*, is material because the Sublease and Consent was premised upon the existence of the TMT CDUP and the Hawaii Supreme Court's subsequent decision was not a fact existing for the BLNR when it considered the application for the consent of the Sublease. *Id.* The Third Circuit Court **ordered** the BLNR to take appropriate action on remand and the court set forth a series of questions in its Order, for the BLNR when considering the new evidence, that the Board may consider:

- a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the Sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?
- b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?
- c) Since the existence of the TMT CDUP is such an integral part of the Board's consent to the Sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to Sublease application process?
- d) In *Mauna Kea Anaina Hou*, Justices Pollack, Wilson and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the State's constitutional obligations. How is the Board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the State fulfill its constitutional obligations?

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<sup>2</sup> The Petitioners request that this Honorable Hearing Officer take judicial notice of the Order for Remand from the Third Circuit Court.



Id.

Up until and through the hearing held on June 17, 2016, and only after the Mauna Kea Anaina Hou, et al. Petitioners raised the issue once again, the BLNR had inexplicably refused and completely disregarded to even address the Third Circuit's Order for Remand, filed April 5, 2016, an Order and determinations in compliance of which completely undermined TIO's request in being admitted as a party in these proceedings, based on TIO's so-called "property interest" through the sublease. And while this Honorable Hearing Officer overruled the Mauna Kea, et al. Petitioners' objections to TIO's request to be admitted as a party, in which the Mauna Kea, et al. Petitioners argued, *inter alia*, that the reliance on the sublease was premature given the issues raised by the Third Circuit in its Order, BLNR Chair Suzanne Case sent out a request for briefing to E. Kalani Flores<sup>3</sup> and to UH's counsel, dated June 28, 2016 (after this Hearing Officers' ruling on the record on June 17, 2016). Please see Exhibit "F" attached hereto which is a true and correct copy of the said letter. Chair Case requested that the parties submit briefs by July 29, 2016 regarding and substantive or procedural issues relating to the Board's consent to the sublease. It is important to note, once again, that Judge Nakamura raised, in part, in his Order for Remand,

(b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?

Please see Exhibit "E."

Once again, and with all due respect to this Honorable Hearing Officer, the Mauna Kea Anaina Hou, et al Petitioners once again reassert their objections regarding the admission of TIO as a party in these proceedings as they submit that such a decision already assumes that there is a valid sublease, with proper consent, and such a decision, as a result, is "run[ning] afoul of the 'cart before the horse' due process concern established in the *Mauna Kea Anaina Hou* opinion," and violates due process and the decisions of the Hawaii Supreme Court and the Third Circuit Court.

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<sup>3</sup> E. Kalani Flores is a party and a member of the Flores-Case 'Ohana in the instant contested case.

## II. ARGUMENT.

Hawaii Administrative Rules ("HAR") § 13-5-31, Permit Applications, provides, in pertinent part, as follows:

(a) Applications for all permits and approvals provided for in this chapter shall be submitted to the department on the form prescribed by the department. The application shall contain:

- (1) A draft or final environmental assessment, draft or final environmental impact statement, or proof of an exemption or request for an exemption from the chapter 343, HRS, process, as applicable;
- (2) Associated plans such as location map, site plan, floor plan, elevations, and landscaping plans drawn to scale;
- (3) The proposed land use shall address their relationship with county general plans and development plans;
- (4) Any other information as determined by the department;
- (5) **Signature of the landowner;**

...

(b) For state and public lands, the State of Hawaii or government entity **with management control over the parcel shall sign as landowner...**

(Emphasis added).

Hawaii Administrative Rules ("HAR") § 13-5-34, Board Permits, provides, in pertinent part, as follows:

(a) Applications for Board permits shall be submitted to the department in accordance with section 13-5-31.

(b) A public hearing, if applicable, shall be held in accordance with section 13-5-40.

...

(d) Contested Case hearings, if applicable, and as required by law, shall be held as provided in chapter 13-1. The aggrieved appellant or person who has demonstrated standing to contest the board action may request a contested case hearing pursuant to chapter 13-1.

A. The CDUA Lacks the Required Signature and the Necessary and Required Parties.

In the Conservation District Use Permit Application ("CDUA") for the Thirty Meter Telescope, Island of Hawai'i, HA-3568, signed on September 2, 2010, the Legal Name of the Applicant was listed as the "University of Hawai'i c/o of University of Hawaii at Hilo" and the contact person and the contact person's title was listed as Dr. Donald Straney, Chancellor [of the University of Hawaii at Hilo]." Please see Exhibit "B" attached hereto which is a true and correct copy of some of the pertinent pages of the CDUP Application, dated September 2, 2010. A signature is included of what appears to be that of Donald Straney, UH Hilo Chancellor, dated September 2, 2010. Under the Overview of the Proposed Use, Section 1.2 of the CDUA, it provides, in pertinent part (with footnote 4 omitted), as follows:

**On behalf of the TMT Observatory Corporation, the University of Hawai'i is seeking a Conservation District Use Permit (CDUP)** from the State of Hawai'i Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory within an area below the summit of Mauna Kea known as "Area E." The Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations. The TMT project is currently a partnership among the TMT Observatory Corporation (TMT), the University of California (UC), the California Institute of Technology (Caltech) and the Association of Canadian Universities for Research in Astronomy (ACURA). The National Astronomical Observatory of Japan (NAOJ) is a collaborator and potential partner, and the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC) and India's Department of Science and Technology (DST) are observers and potential partners in the TMT project.

(Emphasis added). See Exhibit "B."

First of all, HAR § 13-5-31 requires the signature of the landowner and HAR § 13-5-31 (b) requires that in the case of state and public lands, "the State of Hawaii or government entity with management control over the parcel shall sign as landowner." The application was not signed by the Chair of the BLNR, at the time, Laura Thielen, and the application lists the State of Hawaii as "Property Owner."<sup>4</sup> See Exhibit "B"

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<sup>4</sup> The Petitioners reserve to argue and do not waive claims and issues involving the State's alleged ownership of land at Mauna Kea, either.

attached hereto. The application appears to be signed by Dr. Donald Straney, Chancellor of University of Hawaii at Hilo, on behalf of the "Applicant" under the application, which is listed with the "Legal Name" as "University of Hawai'i c/o University of Hawaii at Hilo." See Exhibit "B" attached hereto.

However, the Master Lease for the Mauna Kea Science Reserve (General Lease No. S-4191), dated June 21, 1968, was made by and between the State of Hawaii, by its Board of Land and Natural Resources, as "Lessor," and the University of Hawaii, a body corporate (with a Honolulu address listed in the Master Lease). See Exhibit "A" to Sublease—Master Lease (General Lease No. S-4191)--that is included and attached to the Declaration of J. Douglas Ing as part of Exhibit "A," to his said declaration, dated June 17, 2016, which is a copy of the Sublease and Non-Exclusive Easement Agreement, dated July 28, 2014. The Sublease and Non-Exclusive Easement Agreement, dated July 28, 2014, which is also at issue as discussed herein, was entered into by and between TMT International Observatory, LLC, as "Sublessee," and the University of Hawaii, a public body corporate and the public university of the State of Hawaii ("Sublessor"), and was signed, on behalf of the Sublessor University of Hawaii, by David Lassner, President of the University of Hawaii (As well as by Howard Todo, V.P. for Budget and Finance and Donald Straney, Chancellor of U.H. Hilo). See Exhibit "A" attached to Declaration of J. Douglas Ing, dated June 17, 2016. The signature of the landowner, or in this case, "the government entity with management control over the parcel," the University of Hawaii, should have included and been made by the President of the University of Hawaii, who at that time of the application in September of 2010, would have been M.R.C. Greenwood. Such a signature and authorization was not included in the CDUA. See Exhibit "B" attached hereto. The branch campus of the University of Hawaii system, U.H. Hilo, is not the legal entity with "management control over the Mauna Kea Science Reserve," the lessee, University of Hawaii is under the Master Lease, dated June 21, 1968, and the Chancellor of the branch campus, UH Hilo, is not sufficient and does not comply with the administrative rules or the legal requirements for the application.

Furthermore, by its own concession in the parties required to sign the Sublease and Non-Exclusive Easement Agreement, dated July 28, 2014, it required the President

of the University of Hawaii's signature, who at that time was David Lassner, in order to give the lease agreement legal effect.<sup>5</sup> As a result, the Application in CDUA 3568 does not include the correct signature, nor the authorization, as required under the rules, law, and facts of this case and the CDUA-3568 should be stricken and dismissed. Furthermore, UH Hilo should be dismissed as a party in the instant action. The application needs to be refilled with the proper Applicant and proper signatures and the process started all over again, as required under the rules and the law, with the University of Hawaii as the applicant and David Lassner's signature.

B. The CDUA is Invalid, Null and Void ,and of No Effect.

Secondly, and of important and further conclusive significance, in the Overview of the Proposed Use, Section 1.2 of the CDUA, it provides, in pertinent part (with footnote 4 omitted), as follows:

**On behalf of the TMT Observatory Corporation, the University of Hawai'i is seeking a Conservation District Use Permit (CDUP)** from the State of Hawai'i Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory within an area below the summit of Mauna Kea known as "Area E." The Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations...

(Emphasis added).

The TMT Observatory Corporation did not enter into the purported sublease with the University of Hawaii, dated July 28, 2014, the validity of which has been ordered to be considered by the BLNR by the Third Circuit Court in its Order for Remand as discussed herein, the TMT International Observatory, LLC entered into the said sublease with the University of Hawaii. Further, the Scientific Cooperation Agreement between TMT International Observatory, LLC and the University of Hawaii Concerning the Design, Construction and Operation of the Thirty Meter Telescope on Mauna Kea, Hawaii, signed by U.H. David Lassner and others on July 28, 2014, and Edward C. Stone, Executive Director of TMT International Observatory, LLC, on July 23, 2014, is

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<sup>5</sup> This point is being made without waiving the current challenges regarding the "consent" issue and the validity of the sublease that is still pending, as set forth, also, by the Order for Remand of the Third Circuit, in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civ. No. 14-1-324 (Third Circuit-Hilo). See Exhibit "E" attached hereto.

an agreement between the University of Hawaii and TMT International Observatory LLC. TMT Observatory Corporation is not a party to that agreement, either.

On July 28, 2014, and according to TIO's Memorandum in Support, the University of Hawaii and the TMT International Observatory, LLC. entered into a sublease agreement and non-exclusive easement agreement ("Sublease") in which a portion of the Mauna Kea Science Reserve was subleased by the University of Hawaii to TMT International Observatory, LLC. to construct and operate the TMT Project on Mauna Kea. Please see Page 4 of TIO's Memorandum in Support. A copy of the said sublease was attached to the Declaration of J. Douglas Ing, dated June 17, 2016, that was submitted in the instant case. See Exhibits "A" and "B" attached to the said Declaration of J. Douglas Ing. Also attached to the Declaration of J. Douglas Ing was a copy of a Scientific Cooperation Agreement between TMT International Observatory LLC and the University of Hawaii, dated July 28, 2014, concerning the design, construction and operation of the Thirty Meter Telescope on Mauna Kea, Hawaii. See Exhibit "C" attached to the said Declaration of J. Douglas Ing.

The relationship between TMT Observatory Corporation and TMT International Observatory, LLC ("TIO") was further clarified TIO's position by J. Douglas Ing at the recent hearing on TIO's Motion to be Admitted as a Party, held on June 17, 2016, in the instant case:

HEARING OFFICER AMANO: So I have some questions for Mr. Ing. Mr. Ing, is there a difference between TIO and the Thirty Meter Telescope Observatory?

MR. ING: Yes.

HEARING OFFICER AMANO: So TIO is a new entity?

MR. ING: Yes. It's more recently formed.

HEARING OFFICER AMANO: Are they the same people essentially?

MR. ING: No. So the TMT Observatory Corporation, which is a not-for-profit corporation, was formed years ago. And it initiated the Environmental Impact Statement, as well as became a party – not party, but the application for the CDUP. But it was always known, and it's even disclosed in the EIS that was done in 2008/2009 that a larger entity would be formed and it would likely include governments of Japan, China, India and Canada. That's been disclosed from day one.

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HEARING OFFICER AMANO: I guess what I'm asking is, how is your participation different from UH Hilo's?

MR. ING: Well, while UH Hilo is the Applicant, they control the process. They have a seat at table. TIO does not. But we have most at stake in the outcome of this proceeding.

HEARING OFFICER AMANO: But you didn't have a seat at the table at the first hearing.

MR. ING: We did not, but that's largely because the custom and practice of the department at that time was to have the University prepare and file the application, because they hold the master lease to the summit area. And because they have – essentially the landowner through that master lease, they submit the application.

(Transcript of Proceedings of June 17, 2016: Pages 23-25). Please see Exhibit "D" attached hereto, which are true and correct copies of the said pages in the transcripts). See also the DCCA website records attached hereto as Exhibits "A" and "C."

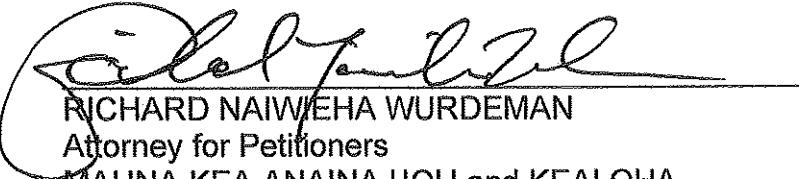
Mr. Ing stated on the record to this Hearing Officer on June 17, 2016 that the reason that it did not have a seat at the table during the first contested case hearing is that "the custom and practice at that time was to have the University prepare and file the application, because they held the master lease." However, based on Mr. Ing's own concessions, and as stated in Section 1.2 of the CDUA (a copy of the pertinent pages being attached hereto as Exhibit "B"), the University of Hawaii brought and filed the CDUA on behalf of TMT Observatory Corporation, a completely different and separate entity, based on Mr. Ing's admissions as well as on the public records, from TMT International Observatory, LLC. Thus, the CDUA is null and void and of no effect, and the law and the facts of the instant case require the application to be stricken and dismissed. After the current CDUA is stricken and dismissed, the TMT International Observatory, LLC and the University of Hawaii (and not U.H. Hilo and not TMT Observatory Corporation) may chose to resubmit a new application, with the proper applicants and information, but, regardless, the striking and dismissal of the current CDUA is required. The Hawaii Supreme Court in the Mauna Kea Anaina Hou decision made it very clear that the days of circumventing legal requirements and railroading

permits and developments will not be tolerated. The current situation is the fault of the University of Hawaii and TMT International Observatory, LLC. and special exceptions cannot be made to the law for their benefit. The laws and the rules need to be followed. In addition, there has never been the opportunity as required under the administrative rules for the public hearing process, as required, for this completely new entity and the CDUA application, nor have the management plans and EIS specifically set forth this new applicant. Finally, in addition to being invalid, null and void, and of no effect, the application is also now moot.

C. CONCLUSION.

Based on the foregoing arguments and authorities, the Mauna Kea Anaina Hou, et al. Petitioners respectfully request that this Honorable Hearing Officer strike and dismiss the Conservation District Use Application, HA-3568, Dated on or about September 2, 2010, and/or grant the Motion for Summary Judgment, striking and dismissing the Conservation District Use Application, HA-3568, as well as dismissing University of Hawaii at Hilo as a party.

DATED: Honolulu, Hawaii, July 15, 2016.



RICHARD NAIWIEHA WURDEMAN

Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA  
PISCIOTTA; CLARENCE KUKAUAKAHI CHING;  
FLORES-CASE OHANA; DEBORAH J. WARD; PAUL  
K. NEVES; and KAHEA: THE HAWAIIAN  
ENVIRONMENTAL ALLIANCE, a domestic non-profit  
Corporation



BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF	)	Case No. BLNR-CC-16-002
	)	
	)	DECLARATION OF COUNSEL
A Contested Case Hearing Re	)	
Conservation District Use Permit	)	
(CDUP) HA-3568 for the Thirty Meter	)	
Telescope at the Mauna Kea Science	)	
Reserve, Kaohe Mauka, Hamakua	)	
District, Island of Hawaii,	)	
TMK (3) 4-4-015:009	)	
_____	)	

DECLARATION OF COUNSEL

I, RICHARD NAIWIEHA WURDEMAN, do declare as follows:

1. I am an attorney licensed to practice law in the State of Hawaii and I represent the Petitioners, MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit Corporation, in the above-entitled matter.
2. I am competent to testify to the matters set forth herein and do so on personal knowledge, unless otherwise indicated.
3. Attached hereto as Exhibit "A" is a true and correct copy of State of Hawaii Department of Commerce and Consumer Affairs ("DCCA") records from the DCCA website (under hbe.ehawaii.gov) relating to TMT Observatory Corporation.
4. Attached hereto as Exhibit "B" are true and correct copies of pertinent pages of the CDUP Application, dated September 2, 2010, in HA-3568 ("CDUA"), that

was submitted by the "University of Hawaii (c/o University of Hawaii at Hilo)" in the pending matter.

5. Attached hereto as Exhibit "C" is a true and correct copy of DCCA records from the DCCA website (under hbe.ehawaii.gov) relating to TMT International Observatory, LLC.

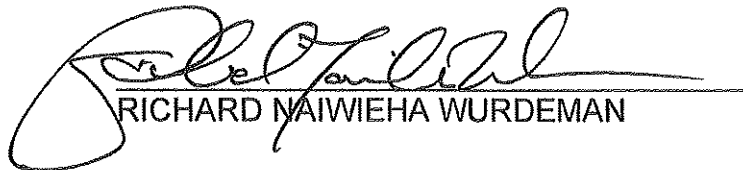
6. Attached hereto as Exhibit "D" are true and correct copies of pertinent pages of the Transcript of Proceedings of June 17, 2016 of the hearing held in the above-entitled case on said date.

7. Attached hereto as Exhibit "E" is a true and correct copy of the Order for Remand in Flores v. Board of Land and Natural Resources, et al.; Civil No. 14-1-324 (Third Circuit--Hilo), that was filed on April 5, 2016.

8. Attached hereto as Exhibit "F" is a true and correct copy of the letter received by E. Kalani Flores from Suzanne D. Case, Chair of the BLNR, dated June 28, 2016.

9. I, RICHARD NAIWIEHA WURDEMAN, do declare under penalty of law do declare that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, July 18, 2016.



RICHARD NAIWIEHA WURDEMAN

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**MASTER NAME**

TMT OBSERVATORY CORPORATION

**BUSINESS TYPE**

Foreign Nonprofit Corporation

**FILE NUMBER**

41198 F2

**STATUS**

Active

**PURPOSE**

TMT WILL DEVELOP, BUILD AND OPERATE A 30 METER CLASS TELESCOPE. THESE FACILITIES WILL BE USED TO FOSTER (1) SCIENTIFIC INTERACTION AMONG EDUCATIONAL AND RESEARCH INSTITUTIONS AND (2) COLLEGE AND UNIVERSITY EDUCATIONAL PROGRAMS IN ASTRONOMY.

**PLACE INCORPORATED**

California UNITED STATES

**REGISTRATION DATE**

Nov 9, 2009

**MAILING ADDRESS**

1111 S ARROYO PARKWAY #200  
PASADENA, California 91105  
UNITED STATES

**AGENT NAME**

THE CORPORATION COMPANY, INC.

**AGENT ADDRESS**

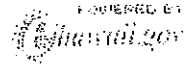
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ADKISON,LARRY	S/D	Oct 1, 2015
CURRIE,DEAN	T/D	Oct 1, 2015
BOLTE, MICHAEL DR	BMD	Oct 1, 2015
HARRISON,FIONA	BMD	Oct 1, 2015
KULKARNI,SHRINIVAS	BMD	Oct 1, 2015
KIRSHNER,ROBERT	D	Oct 1, 2015

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EXHIBIT "B"

---

# CONSERVATION DISTRICT USE PERMIT APPLICATION

Thirty Meter Telescope Project

Island of Hawai'i

Applicant:  
University of Hawai'i at Hilo

---



## Conservation District Use Application (CDUA)

For DLNR Use	
File #	_____
Reviewed by	_____
Date	_____
Accepted by	_____
Date	_____
180-Day Exp. EA/EIS Required	_____
PH Required	_____
Decision Date	_____

Project Location/Address: Mauna Kea Loop Road

District/County: Hāmākua District Island: Hawai'i

Subzone: Resource Tax Map Key(s): 4-4-15:9 – Mauna Kea Science Reserve

Subzone: \_\_\_\_\_ Tax Map Key(s): \_\_\_\_\_

Total Area of Parcel in sq. ft. or acres: 11,288 acres Area of Proposed Use in sq. ft. or acres: 8.7 acres

Indicate which of the following approvals are being sought, as specified in the Hawaii Administrative Rules (HAR), Chapter 13-5.

☒ Board Permit  
☐ Departmental Permit  
☐ Emergency Permit  
☐ Temporary Permit  
☐ Site Plan Approval

### APPLICANT

Legal Name: University of Hawai'i c/o of University of Hawaii at Hilo

Street Address: 200 West Kawili Street

City, State and Zip+4 Code: Hilo, HI 96720

Contact Person & Title: Dr. Donald Straney, Chancellor

Phone No.: 808-974-7444 Fax No.: 808-933-3304

Email: dstraney@hawaii.edu  
Interest in Property: General Lease No. S-4191 covering TMK 4-4-15:9  
\*Signature: *Donald D. Straney* Date: SEP 2 2010  
\*If for a Corporation, Partnership, Agency or Organization, must be signed by an authorized officer.

**PROPERTY  
OWNER(S)**

(If other than the applicant)

Name: State of Hawai'i  
Street Address: 1151 Punchbowl Street, Room 130  
City, State and Zip+4 Code: Honolulu, HI 96813  
Contact Person & Title: Laura Thielen, Chairperson, Board of Land and Natural Resources  
Phone No.: (808) 587-0400 Fax No.: (808) 587-0390  
Email: \_\_\_\_\_  
\*Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
\*For private lands with multiple landowners, landowners whose property interests constitute or exceed 65% of the fee ownership of the subject parcel(s) shall sign the application.

**AGENT**

Name: None  
Street Address: \_\_\_\_\_  
City, State and Zip+4 Code: \_\_\_\_\_  
Contact Person & Title: \_\_\_\_\_  
Phone No.: \_\_\_\_\_ Fax No.: \_\_\_\_\_  
Email: \_\_\_\_\_  
Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
**Emergency Contact Information**  
Contact Person and Title: \_\_\_\_\_ Phone No.: \_\_\_\_\_

Please specify all prior CDUPs received for the subject parcel.

**Prior Conservation District Use Permits, Mauna Kea Science Reserve & Mid-Level Facilities**

<b>Telescope Facilities</b>	
UH 0.6-M, Planetary Patrol (removed 1994)	HA-954, 1977 (post facto)
UH 0.6-M Air Force (removed 2008)	HA-954, 1977 (post facto)
UH 2.2-M	HA-954, 1977 (post facto)
Canada-France-Hawaii Telescope	HA-527, 1974
Fiber Optic Cables from Gemini to CFHT	SPA-HA-06-49, 2006
United Kingdom Infrared Telescope	HA-653, 1975
NASA Infrared Telescope Facility	HA-653, 1975
Caltech Submillimeter Observatory	HA-1492, 1982
James Clerk Maxwell Telescope	HA-1515, 1983
<b>W. M. Keck Observatory</b>	
Keck I	HA-1646, 1984
Keck II	HA-2509, 1991
-Carport	Site Plan Approval, 1997
-Temporary Optical Test Sites	HA-SPA-21, 1998
Very Long Baseline Array Antenna	HA-2174, 1988
Japan National Large Telescope (Subaru)	HA-2462, 1991
-Subaru Concrete Walkway	Site Plan Approval, 1997
-Subaru Seepage Pit Collar	SPA-HA-05-08, 2004 (post facto)
Gemini Northern 8-M Telescope	HA-2691, 1993
Smithsonian Submillimeter Array	HA-2728, 1994
UH Hilo 0.9M Telescope	HA-3406, 2007
<b>Mid-Level Facilities</b>	
Subdivision & Construction of Hale Pōhaku Mid-Level Facilities	HA-1430, 1982
- Removal of Solar Hot Water Heating System	SPA-HA-03-34, 2002
- Installation of Five Septic Tanks	SPA-HA-05-18, 2005
- Minor Renovations to Visitor Information Station	SPA-HA-06-17, 2005
Subdivision to Create ~21-acre Site for Permanent Mid-Level Facilities	HA 1819, 1986
<b>Other Permits and Approvals</b>	
Site Testing	HA-1314, 1981
Road, Power, Conceptual Management Plan	HA-1573, 1983
-Management Plan	HA-1573, 1985
-Revised Management Plan	HA-1573A, 1995 (DLNR co-applicant)
-Upgrade of Summit Power & Communications Distribution System	Site Plan Approval, 1995
-Fiber-Optics from Pōhakuloa to Hale Pōhaku	SPA-HA-96-05, 1996
Wēkiu Bug Habitat Restoration	OA-SPA-01-03, 2000
Temporary Site Testing within Northwest Plateau	HA-3225D, 2005
Restoration of Jeep Road up to Poli'ahu	SPA-HA-10-04, 2009

# 1 Detailed Description of Proposed Use

## 1.1 BACKGROUND

The proposed observatory and other facilities covered by this application are located in the 11,288-acre Mauna Kea Science Reserve (MKSR) (TMK 4-4-15:9) on the upper slopes of Hawai'i Island's Mauna Kea Volcano. First leased by the State of Hawai'i Department of Land and Natural Resources (DLNR) to the University of Hawai'i (UH or University) in 1968, the current lease on the MKSR expires in 2033.

Figure 1.1 shows the mountain's position on the island relative to major towns and roadways. Figure 1.2 shows the MKSR boundaries and the location of other important features and their boundaries on the upper slopes of Mauna Kea. Figure 1.3 focuses on the summit region of the mountain, showing the names of the pu'u, the major existing facilities, and important natural features such as Lake Waiau.

The Mauna Kea summit region is designated as part of the State of Hawai'i Conservation District Resource subzone and as such, uses on the land are subject to the Conservation District rules (HAR 13-5) and permit conditions. In addition, uses on the land are subject to the *Mauna Kea Science Reserve Master Plan* (UH 2000) and *Mauna Kea Comprehensive Management Plan* (CMP) and subplans (UH 2009a). As State land it is administered by the State of Hawai'i Department of Land and Natural Resources (DLNR) as directed by the Board of Land and Natural Resources (BLNR). Effective January 1, 1968, the BLNR leased the land (General Lease S-4191) to the University of Hawai'i; the lease terminates on December 31, 2033.

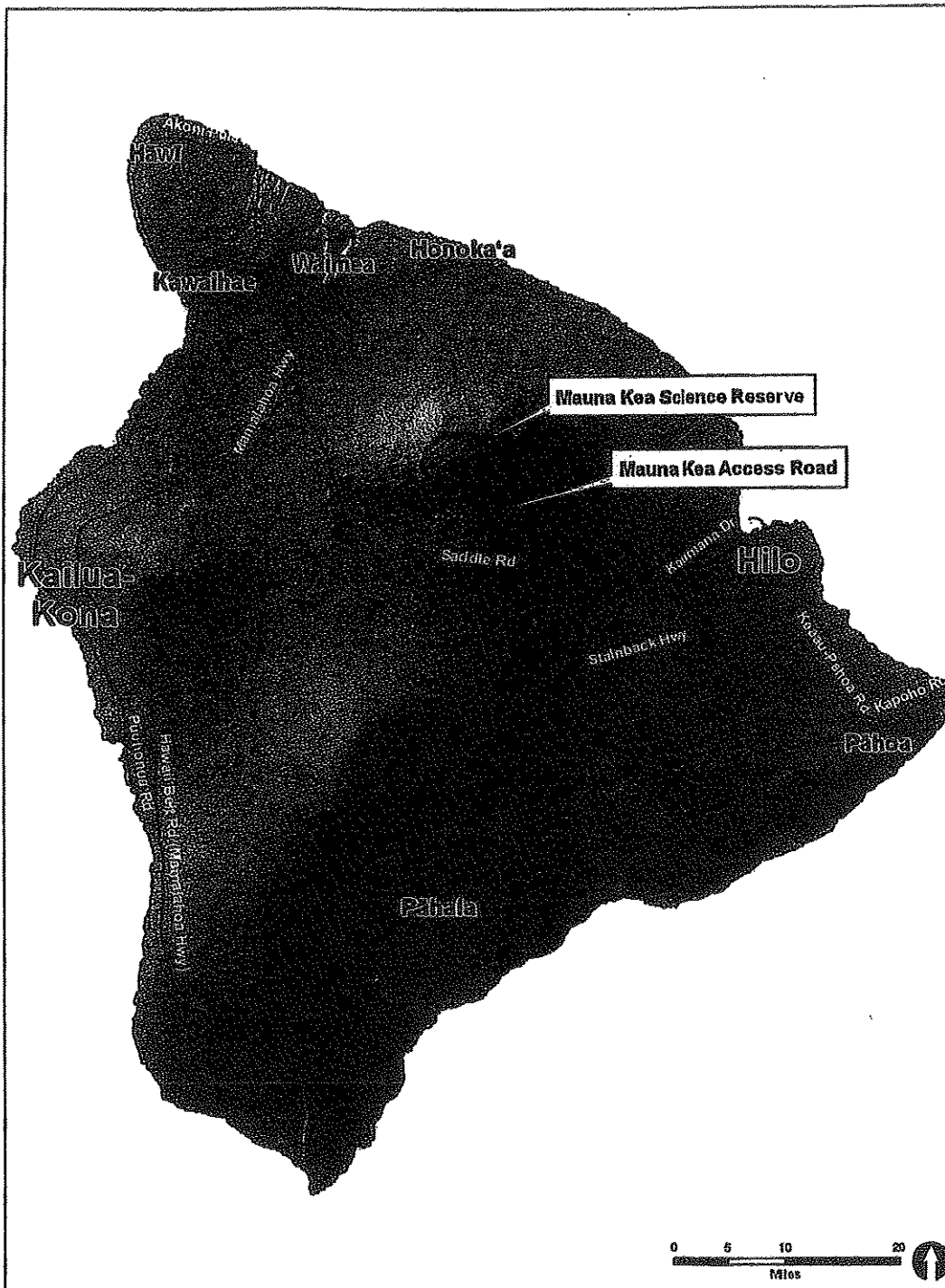
As shown in Table 1.1, thirteen astronomical facilities are operational in mid-2010. Nine of these are optical and/or infrared observatories<sup>1</sup>; these use mirrors to collect and focus visible and infrared light. The MKSR also hosts three submillimeter observatories and a radio antenna (the VLBA) that is part of a larger system.<sup>2</sup> All except the VLBA Antenna are located within the 525-acre area at the summit that the University of Hawai'i's *Mauna Kea Science Reserve Master Plan* refers to as the "Astronomy Precinct".

<sup>1</sup> This counts Keck I and Keck II separately.

<sup>2</sup> Submillimeter wave astronomy is a relatively new branch of astronomy that studies celestial objects using the submillimeter band of the electromagnetic spectrum (300 GHz to 3,000 GHz). Most of the radiation in this band is blocked by the earth's atmosphere, and it is only with the development of high-altitude facilities such as those on Mauna Kea that scientists have been able to acquire the valuable information it contains.

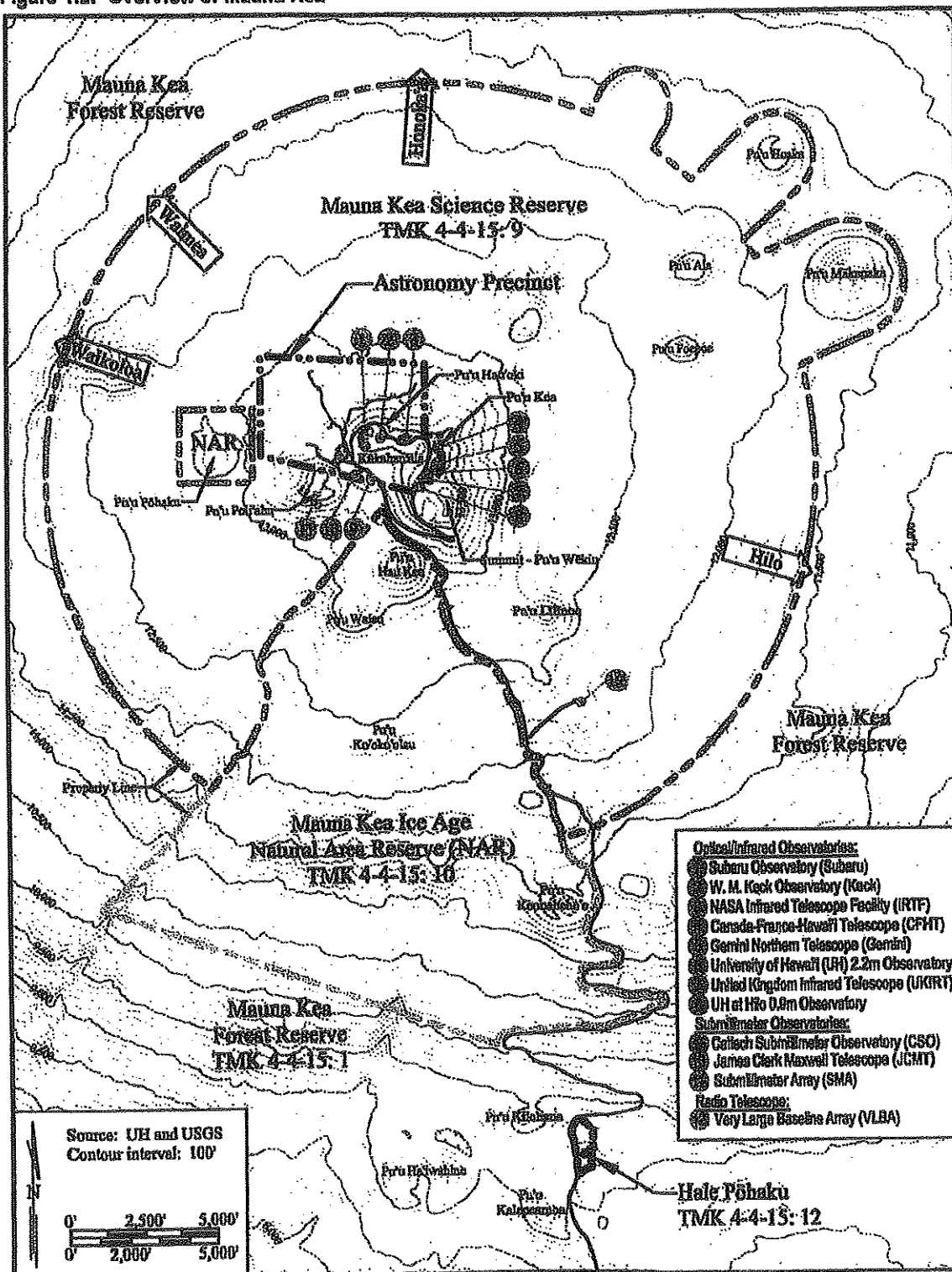
The Very Long Baseline Array (VLBA) radio antenna is a telescope but does not individually meet the definition of an observatory because it is only one part of a larger array, which stretches from the U.S. Virgin Islands to Mauna Kea.

**Figure 1.1 Project Location**



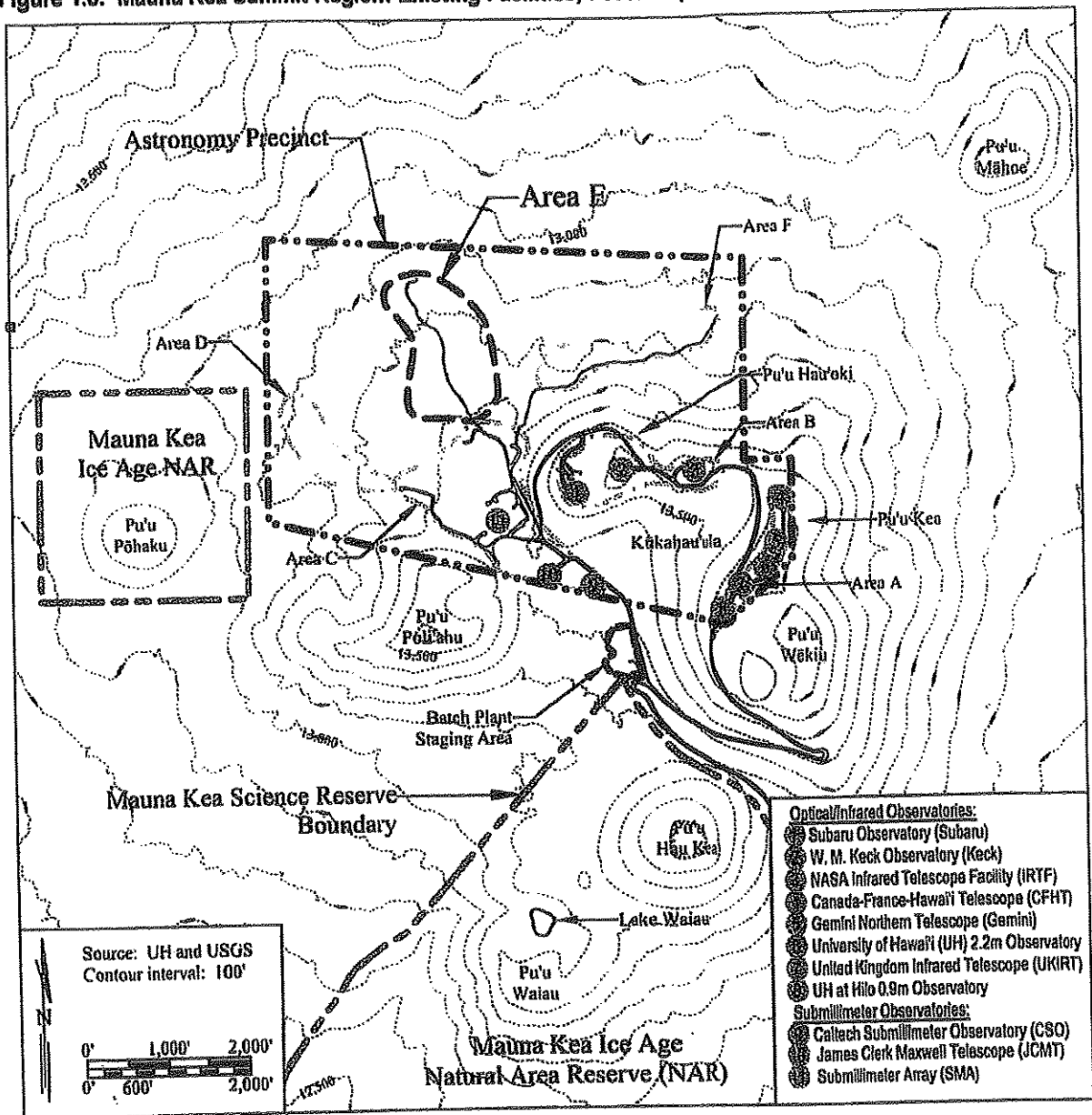
Source: Planning Solutions, Inc.

Figure 1.2: Overview of Mauna Kea



Source: Figure 2-2, Final EIS: TMT Observatory

**Figure 1.3: Mauna Kea Summit Region: Existing Facilities, Features, & Future Development Areas**



Source: Figure 2-3, Final EIS: TMT Observatory

**Table 1.1. Mauna Kea Telescopes (as of 2010)**

	Facility Name	Mirror Size (in meters)	Owner/Operator	Year Built
<b>Optical/Infrared</b>				
UH 2.2m	UH 2.2-m Telescope	2.2m	University of Hawai'i	1970
IRTF	NASA Infrared Telescope Facility	3.0m	NASA	1979
CFHT	Canada-France-Hawai'i Telescope	3.6m	Canada/France/UH	1979
UKIRT	United Kingdom Infrared Telescope	3.8m	United Kingdom	1979
Keck I	W. M. Keck Observatory	10m	Caltech/University of California	1992
Keck II	W. M. Keck Observatory	10m	Caltech/University of California	1996
Subaru	Subaru Telescope	8.3m	Japan	1999
Gemini	Gemini North Telescope	8.1m	USA/UK/Canada/Argentina/Australia/Brazil/Chile	1999
UHH 0.9m <sup>3</sup>	UHH 0.9-m Telescope	0.9m	University of Hawai'i, Hilo	2008
<b>Radio</b>				
CSO	Caltech Submillimeter Observatory	10.4m	Caltech/NSF	1987
JCMT	James Clerk Maxwell Telescope	15m	UK/Canada/Netherlands	1987
SMA	Submillimeter Array	8x6m	Smithsonian Astrophysical Observatory/Taiwan	2002
VLBA	Very Long Baseline Array	25m	NRAO/AUI/NSF	1992

Note: The California Institute of Technology (Caltech) has announced that it will begin decommissioning the Submillimeter Observatory (CSO) in 2016 with the return of the site to its natural state, consistent with the terms of the CSO sublease by 2018.

Source: [http://www.ifa.hawaii.edu/mko/telescope\\_table.htm](http://www.ifa.hawaii.edu/mko/telescope_table.htm) as reported in the *Decommissioning Plan for Mauna Kea Observatories*, dated January 2010.

These observatories have been attracted to the summit region of Mauna Kea principally because of the superb viewing conditions that its high-altitude/mid-oceanic location provides. The intellectual and physical support infrastructure that has been developed around the complex complements these natural assets. Combined, they have helped Hawai'i become one of the most important centers for astronomical research in the world.

## 1.2 OVERVIEW OF THE PROPOSED USE

On behalf of the TMT Observatory Corporation, the University of Hawai'i is seeking a Conservation District Use Permit (CDUP) from the State of Hawai'i Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory<sup>4</sup> within an area below the summit of Mauna Kea that is known as "Area E". The TMT Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations. The TMT project is currently a partnership among the TMT Observatory Corporation (TMT), the University of California (UC), the California Institute of Technology

<sup>3</sup> In 2008 the UH 0.6-m telescope (built in 1968) was replaced by the UHH 0.9-m telescope.

<sup>4</sup> An observatory includes the telescope(s), the dome(s) that contain the telescope(s), and the instrumentation and support facilities for the telescope(s) that fall under a common ownership.



(Caltech) and the Association of Canadian Universities for Research in Astronomy (ACURA). The National Astronomical Observatory of Japan (NAOJ) is a collaborator and potential partner, and the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC) and India's Department of Science and Technology (DST) are observers and potential partners in the TMT project.

Management Action FLU-1 in the recently adopted CMP states that future facility planning should follow the guidelines presented in the University of Hawai'i *Mauna Kea Science Reserve Master Plan*, referred to as the *2000 Master Plan* (University of Hawai'i, 2000). The *2000 Master Plan* limits future development to the Astronomy Precinct and identifies Areas A through F within it as preferred sites (Figure 1.3). It also lists criteria to assist in the selection of an appropriate site for a ground-based telescope with a primary mirror of 25 to 50 meters in diameter (generically referred to as a "Next Generation Large Telescope", or NGLT in the *2000 Master Plan*). The *2000 Master Plan* identifies Area E as the preferred location for an NGLT.<sup>5</sup> Area E is located approximately 1/2-mile northwest of the nine existing optical/infrared observatories located near the summit.

The TMT Observatory is proposed for a roughly 5-acre site within Area E, near the end of an existing 4-wheel drive road. Road access to the site will be provided by improving the existing four-wheel drive road from the point where it diverges from the existing Mauna Kea Loop Road. This includes one segment across the base of Pu'u Hau'oki and another that extends through the existing Submillimeter Array (SMA) complex and Area E. Leasehold title and ongoing maintenance of the roadway will remain the responsibility of the University as part of the common areas under its jurisdiction.

### 1.3 DETAILED DESCRIPTION OF TMT FACILITIES

The following subsections describe the various components that make up the proposed TMT project that are within the Conservation District:

- Section 1.3.1 covers the proposed TMT Observatory, which consists of the 30-meter telescope itself, the instruments that are attached to it to record data, the enclosing dome, the attached building housing support and maintenance facilities, and parking. The Observatory is located on what is generally referred to as the 13-North (13N) site within the Astronomy Precinct of the MKSR.
- Section 1.3.2 describes the proposed TMT Access Way, which consists of an improved road and underground utilities (power and telecommunications) improvements that will be constructed to connect the TMT Observatory with existing roads and utilities.
- Section 1.3.3 briefly discusses the proposed use of the existing Batch Plant Staging Area during construction of the TMT Observatory and Access Way. Approximately 4 acres in size, this area is located at the top of the Mauna Kea Access Road, and its use as a construction staging area has been authorized as a temporary accessory use in several previous CDUPs (e.g., those for the Subaru, Keck II, and SMA telescope facilities).

<sup>5</sup> It should be noted that the 2000 Master Plan limits future development to Areas A, B, C, D, E, and F within the Astronomy Precinct. By doing this, the Master Plan removed the possibility of developing an observatory on an undeveloped pu'u within the MKSR.

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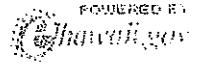
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MASTER NAME	TMT INTERNATIONAL OBSERVATORY LLC
BUSINESS TYPE	Foreign Limited Liability Company (LLC)
FILE NUMBER	116689 C6
STATUS	Active
PLACE INCORPORATED	Delaware UNITED STATES
REGISTRATION DATE	May 6, 2014
MAILING ADDRESS	1111 S ARROYO PKWY STE 200 PASADENA, California 91105 UNITED STATES
PARTNER TERM	AT-WILL
MANAGED BY	MANAGER(S)
AGENT NAME	THE CORPORATION COMPANY, INC.
AGENT ADDRESS	1136 UNION MALL STE 301 HONOLULU, Hawaii 96813 UNITED STATES

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EXHIBIT "D"

## BOARD OF LAND AND NATURAL RESOURCES

## STATE OF HAWAII

IN THE MATTER OF ) CASE NO. BLNR-CC-002  
)  
Contested Case Hearing Re )  
Conservation District Use )  
Application (CDUA) HA-3568 )  
For The Thirty Meter )  
Telescope at the Mauna Kea )  
Science Reserve, Ka'ohe )  
Mauka, Hamakua, Hawai'i )  
TMK (3)4-4-015:009 )  
\_\_\_\_\_ )

## REQUEST FOR ADMISSION AND MOTIONS

Held on June 17, 2016, commencing at 10:00 a.m. at  
the Hilo State Office, Conference Rooms A, B and C,  
75 Aupuni Street, Hilo, Hawaii 96720.

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JUDGE RIKI MAY AMANO, Hearing Officer

3 JULIE CHINA, Deputy Attorney General  
4 WILLIAM WYNHOFF, Deputy Attorney General

5 STEPHEN MICHAEL CAIN, Staff Planner

6 TIM LUI-KWON, ESQ.

7 JOHN P. MANAUT, ESQ.

8 IAN L. SANDISON, ESQ.

9 Attorneys for University of Hawaii

10 RICHARD N. WURDEMAN, ESQ.

11 Attorney for Mauna Kea Anaina Hou, et al

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1 Board. There was a remand for response to questions  
2 which will go back to Judge Nakamura. Even more  
3 important, there was no request for injunction or  
4 stay for the consent that was actually issued.

5 As far as the sublease goes, TIO is  
6 currently paying the University's sublease rent. We  
7 also support the contention or the claim that the  
8 sublease is a valid document and remains a valid  
9 document.

10 HEARING OFFICER AMANO: So I have some  
11 questions for Mr. Ing.

12 Mr. Ing, is there a difference between TIO  
13 and the Thirty Meter Telescope Observatory?

14 MR. ING: Yes.

15 HEARING OFFICER AMANO: So TIO is a new  
16 entity?

17 MR. ING: Yes. It's more recently formed.

18 HEARING OFFICER AMANO: Are they the same  
19 people essentially?

20 MR. ING: No. So the TMT Observatory  
21 Corporation, which is a not-for-profit corporation,  
22 was formed years ago. And it initiated the  
23 Environmental Impact Statement, as well as became a  
24 party -- not party, but the application for the CDUP.  
25 But it was always known, and it's even disclosed in

1 the EIS that was done in 2008/2009 that a larger  
2 entity would be formed and it would likely include  
3 governments of Japan, China, India and Canada.  
4 That's been disclosed from day one.

5 HEARING OFFICER AMANO: So do you  
6 anticipate that with this new hearing there would be  
7 additional information that you would be adding to  
8 the hearing?

9 MR. ING: I definitely anticipate  
10 presenting witnesses and presenting evidence that go  
11 to the merits of the Conservation District Use  
12 Application.

13 HEARING OFFICER AMANO: I guess what I'm  
14 asking is, how is your participation different from  
15 UH Hilo's?

16 MR. ING: Well, while UH Hilo is the  
17 Applicant, they control the process. They have a  
18 seat at table. TIO does not. But we have most at  
19 stake in the outcome of this proceeding.

20 HEARING OFFICER AMANO: But you didn't have  
21 a seat at table at the first hearing.

22 MR. ING: We did not, but that's largely  
23 because the custom and practice of the department at  
24 that time was to have the University prepare and file  
25 the application, because they hold the master lease

1 to the summit area. And because they have --  
2 essentially the landowner through that master lease,  
3 they submit the application.

4 HEARING OFFICER AMANO: If TIO is allowed  
5 to participate as a party, like any party, you would  
6 be expected to abide by the procedural rules that I  
7 intend to set up, things like witness list, exhibit  
8 list, that sort of thing, all the hearing  
9 requirements. Also to participate full-time and  
10 attend all the hearings and the conferences, and they  
11 are going to be here on Hawaii Island. And finally  
12 you would also be required, as a party, under the  
13 rules, to submit a Findings of Fact, and Conclusions  
14 of Law. Is TIO fully committed to do all those  
15 things.

16 MR. ING: Your Honor, we are fully  
17 committed to do all of that and have already done  
18 most of it.

19 HEARING OFFICER AMANO: Okay. Any other  
20 questions for you, Mr. Wurdeman?

21 MR. WURDEMAN: Yes.

22 Again, we strenuously object. If TIO is  
23 allowed into this party, then I think the appropriate  
24 motion to strike and dismiss the application, which  
25 was brought up on behalf of the other entity, sounds

## CERTIFICATE

STATE OF HAWAII

)

) SS.

COUNTY OF HONOLULU

)

I, JEAN MARIE McMANUS, do hereby certify:

That on June 17, 2016, at 12:50 p.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 17th day of June, 2016, in Honolulu, Hawaii.

/s/ Jean Marie McManus

\_\_\_\_\_  
JEAN MARIE McMANUS, CSR #156

EXHIBIT "E"

FILED

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Email: [ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)

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Appellant Pro Se

S. FOR. WAKA, CLERK  
THIRD CIRCUIT COURT  
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT<sup>1</sup>\*  
STATE OF HAWAII

E. KALANI FLORES,	) CIVIL NO. 14-1-324 (Hilo)
	) (Agency Appeal)
Appellant pro se,	)
	)
vs.	) <b>ORDER FOR REMAND</b>
	)
BOARD OF LAND AND NATURAL	)
RESOURCES; DEPARTMENT OF LAND	)
AND NATURAL RESOURCES; SUZANNE	)
D. CASE, in her official capacity as	) <u>Hearing on Oral Argument:</u>
Chairperson of the Board of Land and Natural	) Date: March 11, 2016
Resources and the Director of the Department of	) Time: 10:00 a.m.
Land and Natural Resources; STATE OF	) Judge: Honorable Greg K. Nakamura
HAWAII; and UNIVERSITY OF HAWAII,	)
	)
Appellees.	)
	)

**ORDER FOR REMAND**

The matter of this agency appeal, notice of which was filed herein pursuant to Section 91-14, Hawai'i Revised Statutes, on August 25, 2014, having come on for oral argument before the Environmental Court of the Third Circuit (hereinafter "**Court**"), the Honorable Greg K. Nakamura presiding, on March 11, 2016 and E. KALANI FLORES, Appellant, having appeared *pro se* together with Deputy Attorney General Julie H. China, counsel for Appellees BOARD OF LAND AND LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES and SUZANNE D. CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources, STATE OF HAWAII and Arsima A. Muller and Tim Lui-Kwan appearing as counsel for Appellee UNIVERSITY OF HAWAII. No other appearances were made.

\*Environmental Court

I hereby certify that this is a full, true and correct  
copy of the original on file in this office.



S. FOR. WAKA, Clerk, State of Hawaii

The Court, having considered the record, memoranda, declarations, briefs and arguments presented or submitted herein, and good cause appearing therefor, hereby issues the following findings of fact, conclusions of law and order:

**I. FINDINGS OF FACT**

The Court makes the following findings of fact, however, to the extent that these findings of fact contain conclusions of law, they shall be considered as such.

1. This appeal relates to Appellee Board of Land and Natural Resources' (the "**Board**") consent to the Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii (the "**Sublease**").

2. At a meeting held on June 27, 2014, the Board granted consent to the Sublease, but "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded.

3. At a meeting held on July 25, 2014, the Board denied Appellant E. Kalani Flores' request for a contested case hearing.

4. The Sublease is part of the record. Paragraph 4 of the Sublease relates to the "Use of the Subleased Premises". It states in part:

The construction and operation of the Subleased Premises shall be conducted in strict compliance with the terms and conditions of Conservation District Use Permit HA-3568 approved by the Lessor [the "**Board**"] on April 12, 2013 (the "**TMT CDUP**"), including performance of all mitigation conditions set forth therein, and any amended or subsequent Conservation District Use.

5. The Consent to Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii Under General Lease No. S-4191 (the "**Consent**") is part of the record. Paragraph 2 of the Consent states:

Sublessee [the TMT International Observatory LLC] shall comply with all the conditions of Conservation District Use Permit No. HA-3568, as approved by the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law, and Decision and Order issued on April 12, 2013.

## II. CONCLUSIONS OF LAW

The Court, based on the finding of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. The Court takes judicial notice of the Supreme Court of Hawai'i's opinion entered on December 2, 2015 in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

2. Consistent with *Mauna Kea Anaina Hou* opinion, the Board's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit HA-3568 (the "TMT CDUP") has been vacated.

3. Appellant has asked that this Court take judicial notice of the opinion in *Mauna Kea Anaina Hou* and vacate the Board's action in consenting to the Sublease. This is not appropriate because it requires consideration of an adjudicative fact, the vacating of the TMT CDUP, which the Board has not addressed.

4. However, Section 91-14(e) of the Hawai'i Revised Statutes ("HRS") provides the following:

[i]f, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision

5. Appellant's request that the Court take judicial notice of the *Mauna Kea Anaina Hou* opinion is the functional equivalent of a request that the fact that the TMT CDUP has been vacated be presented to the Board.

6. This fact is material because the Sublease and Consent are premised upon the existence of the TMT CDUP.



7. This fact could not have been presented to the Board when it considered the application for the consent to the Sublease because the fact did not exist at that time.

8. Therefore, the *Mauna Kea Anaina Hou* opinion and the Order for Remand, filed on February 22, 2016 in Civil No. 13-1-349, *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, State of Hawai'i, et al.*, Third Circuit Court, State of Hawai'i (the "**Order of Remand**"), should be presented to the Board for appropriate action.

9. Therefore, an order of remand should be entered in this case to accomplish this purpose.

10. When reviewing the new evidence, the Board may consider the following questions:

- a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the Sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?
- b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?
- c) Since the existence of the TMT CDUP is such an integral part of the Board's consent to the Sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to Sublease application process?
- d) In *Mauna Kea Anaina Hou*, Justices Pollack, Wilson and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the State's constitutional obligations. How is the Board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the State fulfill its constitutional obligations?

III. **ORDER**

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:


1. That the *Mauna Kea Anaina Hou* opinion and the Order for Remand be presented to the Board as additional evidence;
2. And that the Court further orders that this matter be remanded back to the Board for appropriate action in accordance with HRS § 91-14(e).

DATED: Hilo, Hawai'i APR - 5 2016


GREG K. NAKAMURA (Seal)

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

  
JULIE H. CHINA  
Deputy Attorney General

Attorneys for Appellees  
BOARD OF LAND AND NATURAL  
RESOURCES; DEPARTMENT OF LAND AND  
NATURAL RESOURCES; SUZANNE D. CASE,  
in her official capacity as Chairperson of the Board  
of Land and Natural Resources and the Director of  
the Department of Land and Natural Resources;  
STATE OF HAWAII

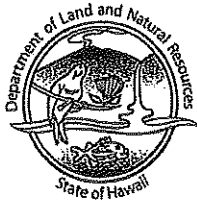
  
TIM LUI-KWAN  
ARSIMA A. MULLER

Attorneys for Appellee  
UNIVERSITY OF HAWAII

*E. Kalani Flores vs. Board of Land and Natural Resources, et al.*, Civil No. 14-1-324; ORDER  
FOR REMAND

EXHIBIT "F"

DAVID Y. IGE  
GOVERNOR OF  
HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

June 28, 2016

Mr. E. Kalani Flores  
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Kamuela, Hawaii 96743

Tim Lui-Kwan, Esq.  
Arsima A. Muller, Esq.  
Carlsmith Ball LLP  
1001 Bishop Street  
ASB Tower, Suite 2200  
Honolulu, Hawaii 96813

Re: *Flores v. Board of Land and Natural Resources, et al.*,  
Civil No. 14-1-324 (Hilo), Order for Remand

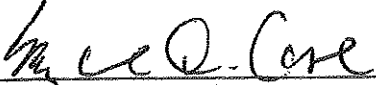
Dear Mr. Flores, Mr. Lui-Kwan, and Ms. Muller:

At its meeting of June 27, 2014, under agenda Item D-19, the Board of Land and Natural Resources (Board) approved a request by the University of Hawai'i for its consent to a sublease of a portion of Mauna Kea lands to TMT International Observatory LLC. The Board, however, stayed the effectiveness of the consent until administrative proceedings on the pending contested case requests were concluded.

At its meeting of July 25, 2014, under agenda Item D-13, the Board denied Mr. Flores' request for a contested case hearing. Mr. Flores appealed the denial and on April 5, 2016, the Circuit Court of the Third Circuit, in *Flores v. Board of Land and Natural Resources, et al.*, Civil No. 14-1-324 (Hilo), issued an Order for Remand, directing the Board to consider its order and the Supreme Court's decision in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376, 363 P.3d 224 (2015), as additional evidence. Copies of the Circuit Court's order in *Flores* and the Supreme Court's decision in *Mauna Kea Anaina Hou* are appended to this letter.

The parties are hereby ordered to submit briefs on the remand. The briefs may discuss any substantive or procedural issue relating to the Board's consent. All briefs must be filed with the Board of Land and Natural Resources, 1151 Punchbowl Street, Room 130, Honolulu, Hawai'i 96813, by 4:00 p.m. on July 29, 2016, and served on the parties to the remand.

Sincerely,

  
SUZANNE D. CASE, Chairperson  
Board of Land and Natural Resources

enclosures  
cc: Julie H. China, Deputy Attorney General

SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA  
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.  
DEPUTY DIRECTOR - WATER

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ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF	)	Case No. BLNR-CC-16-002
	)	
	)	CERTIFICATE OF SERVICE
A Contested Case Hearing Re	)	
Conservation District Use Permit	)	
(CDUP) HA-3568 for the Thirty Meter	)	
Telescope at the Mauna Kea Science	)	
Reserve, Kahohe Mauka, Hamakua	)	
District, Island of Hawaii,	)	
TMK (3) 4-4-015:009	)	
_____	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following parties by the means indicated:

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*Custodian of the Records*  
*(original + digital copy)*

Judge Riki May Amano (Ret.)  
[rma3cc@yahoo.com](mailto:rma3cc@yahoo.com)  
*Hearing Officer*

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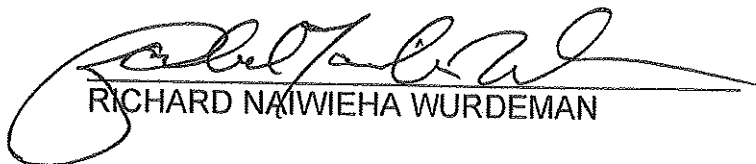
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DATED: Honolulu, Hawaii, July 18, 2016.



RICHARD NĀIWIEHA WURDEMAN